IN THE

Supreme Court of The United States

OCTOBER TERM 1976

No. 76-651

W. W. FOWLKES AND LAURA JANE FOWLKES,

Petitioners,

v.

INTRATEX GAS COMPANY AND
OASIS PIPE LINE COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Of Counsel:
RICHARD C. ALSUP
JAMES H. CHANDLER
1600 Houston Natural Gas Building
Houston, Texas 77002
713-654-6777

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
2100 First City National Bank Building
Houston, Texas 77002
713-651-2222

J. EVANS ATTWELL
JOHN L. CARTER
P. M. SCHENKKAN
2100 First City National Bank Building
Houston, Texas 77002
713-651-2222

Attorneys For Respondents

Bowne of Houston, Inc. Printed in U.S.A.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Question Presented for Review	1
Statement of the Case	1
Reasons for Denying the Writ	
1. Summary of Respondents' Position	4
2. The Questions Postulated By The Fowlkes Are Limited to the Facts of this Case	5
3. The Question Actually Presented Below Was Properly Decided on the Basis of Settled Law	5
Conclusion	8
Certificate of Service	9

TABLE OF AUTHORITIES

Cases

	PAGE
Arcola Sugar Mills Co. v. Houston Lighting and Power Company, 153 S.W.2d 628 (Tex. Civ. App. — Galveston 1941, writ ref'd w.o.m.)	6
County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959)	7
Dallas Cotton Mills v. Industrial Co., 296 S.W. 503 (Tex. Comm. App. 1927, jdgmt adopted)	6
Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex.), *aff'd* 419 U.S. 1042 (1974)	3, 4
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)	6
Porter v. Southwestern Public Service Company, 489 S.W.2d 361 (Tex. Civ. App. — Amarillo 1972, writ ref'd n.r.e.)	6
Reetz v. Bozanich, 397 U.S. 82 (1970)	6
Smart v. Texas Power & Light Co., 525 F.2d 1209 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 5, 1976)	4

Constitution and Statutes

Texas Constitution, Article 1, Section 17	6
Tex. Rev. Civ. Stat. Ann. art. 1435	2
Tex. Rev. Civ. Stat. Ann. art. 1436	2
Tex. Rev. Civ. Stat. Ann. art. 6020	2
Tex. Rev. Civ. Stat. Ann. art. 6022	2
28 U.S.C. § 1331 (1970)	2, 3, 7
28 U.S.C. § 1343 (1970)	2, 7
42 U.S.C. § 1983 (1970)	2

IN THE

Supreme Court of The United States

OCTOBER TERM 1976

No. 76-651

W. W. FOWLKES AND LAURA JANE FOWLKES,
Petitioners,

v.

INTRATEX GAS COMPANY AND
OASIS PIPE LINE COMPANY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Did the courts below err in holding that, on the facts of this case, respondent pipelines were entitled to summary judgment against petitioner landowners?

STATEMENT OF THE CASE

In January 1972, Intratex Gas Company ("Intratex") and Oasis Pipe Line Company ("Oasis") instituted eminent domain proceedings in state court in Kendall County, Texas, to secure an easement across land owned by W. W. and Laura Jane Fowlkes ("the Fowlkes"). Special commissioners, appointed to assess the damages to the Fowlkes' land, entered an award of $3,313. The Fowlkes appealed the decision of the commissioners to a Texas district court, challenging not only the amount of the award but also the right of Intratex and Oasis to condemn their land. This

state court proceeding is still pending and the Fowlkes have vigorously exercised their right of discovery.[1]

Almost two years after initiation of the pending Texas state court proceeding the Fowlkes brought suit, in October 1974, against Intratex and Oasis in the U. S. District Court for the Western District of Texas. There, the Fowlkes made one claim: various Texas eminent domain statutes were unconstitutional because "by their terms [they] sanction such taking [of the Fowlkes' property] for purposes other than public purposes . . . ." (App. 20.) The Fowlkes did not plead that Intratex and Oasis had failed to comply with applicable Texas eminent domain law; in fact, they affirmatively alleged that Intratex and Oasis were complying with Texas law. (App. 3, 9.) They asserted that the federal district court had jurisdiction over their action either under 28 U.S.C. § 1331 (1970), general federal question jurisdiction, or under 28 U.S.C. § 1343, the jurisdictional basis for actions brought under 42 U.S.C. § 1983, the Civil Rights Act of 1871. The Fowlkes did not plead diversity of citizenship as a basis of jurisdiction, and indeed could not have done so.

Intratex and Oasis moved for summary judgment on the ground that the Texas statutes[2] attacked by the Fowlkes do not authorize condemnation of private property for private purposes, and hence that the Fowlkes had presented no federal constitutional issue. In the alternative, Intratex and Oasis moved for abstention as to the merits in the event that the district court denied the motion for summary judgment and held that a legal question existed as to whether the Texas statutes permitted unconstitutional condemnations. Finally, they moved for dismissal as to the general federal question basis of jurisdiction on the ground of insufficient amount in controversy.

[1] C. A. No. 2092 in the 2nd 38th Judicial District Court of Kendall County, Texas. (App. 96-98.) References to "App." are to the Appendix filed in the Fifth Circuit, which was forwarded to this Court by the Clerk of the Fifth Circuit on November 30, 1976.

[2] Arts. 1435, 1436, 6020, and 6022 Tex. Rev. Civ. Stat. Ann.

The district court granted the motion for summary judgment, stating that the Texas statutes in question "pass constitutional muster" and citing *Joiner* v. *City of Dallas*, 380 F. Supp. 754, 764-799 (N.D. Tex.), which has been affirmed by this court, 419 U.S. 1042 (1974). As to "any factual dispute that may be created in the application of state law," the district court remarked that such a dispute

> is — in the absence of diversity of citizenship — a matter of state law to be determined by a state court of competent jurisdiction. The parties are already there and should litigate their respective rights in that forum.

Petitioners' Appendix at 5a.

In view of its decision on the merits, the district court saw no need to order abstention. In dictum, the district court did say that the Fowlkes had submitted nothing "competent" to show that they could meet the jurisdictional amount in controversy required under 28 U.S.C. § 1331 (1970).

The Fowlkes appealed to the Fifth Circuit. For the first time in these proceedings, they argued that there had been a fact question concerning whether Intratex and Oasis had in fact taken the Fowlkes' property for private purposes. This question, they argued, was before the district court and should have precluded summary judgment. They also argued at length that their suit satisfied the jurisdictional amount requirement of section 1331 and that abstention was improper.

The Fifth Circuit affirmed the district court's decision. The Fifth Circuit noted:

> [T]he legal issue with respect to either jurisdictional premise concerns the constitutionality of Texas eminent domain proceedings. This and other courts have had occasion to hold these statutes constitutional.

Petitioners' Appendix at 9a.[3] As to this legal issue, the Fifth Circuit held that no genuine issue of material fact had been raised; accordingly, "summary judgment was appropriate." The Fifth Circuit had no need to discuss, and did not discuss, jurisdictional amount or abstention.

REASONS FOR DENYING THE WRIT

1. *Summary of Respondents' Position.*

The Fowlkes seek certiorari on the ground that it was improper for the district court to grant summary judgment on the facts of this case, rather than hearing evidence to determine whether Intratex and Oasis utilized the Texas condemnation statutes for public or for private purposes. It is obvious from the Fowlkes' own statement of their case that certiorari should be denied. They admit that the most that is involved in this case is a narrow question, peculiar to this case alone, concerning the particular purposes for which Intratex and Oasis took an easement across their land. Thus, any decision by this court would apply only to the facts of this case and would involve the application of absolutely settled law concerning summary judgment procedures.

Further, the decisions of the district court and the Fifth Circuit were entirely proper. The fact question that the Fowlkes now seek to raise would be relevant only to one legal issue: whether Intratex and Oasis violated *Texas* law in this case. Since (as the Fowlkes themselves concede) Texas law clearly prohibits the taking of private property for private purposes, it protects their federal constitutional rights in full. Whether Intratex and Oasis took the Fowlkes' land for private purposes is thus a state law question which must, can, and is being pursued by the Fowlkes in state court.[4] It cannot be raised in federal district court except when there is diversity of citizenship jurisdiction, which is not present in this case.

[3] In support of its decision the Fifth Circuit cited *Joiner*, a decision affirmed by this Court, and *Smcrt* v. *Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 5, 1976).

[4] See note 1 *supra*, and accompanying text.

2. *The Questions Postulated By The Fowlkes Are Limited to the Facts of this Case.*

The Fowlkes state that this case presents three questions. The first two of these, as is plain from the Fowlkes' own statement of them, are questions concerning the factual circumstances of this particular case. The Fowlkes ask whether or not the two courts below correctly found no genuine issue of material fact concerning the purpose for which state condemnation statutes were used in this one particular proceeding. They also ask whether or not the two courts below correctly found that less than $10,000 was in issue. Intratex and Oasis respectfully submit that this Court does not sit to resolve such questions. The third question which the Fowlkes would present for review is whether abstention would be appropriate. It follows from the statement of the case outlined above that both of the courts below properly regarded this question as not being before them. Having found that summary judgment should be rendered, because the state law in question was clear, there was no occasion to consider whether abstention should be ordered to permit a state court to resolve unclear questions of state law.

3. *The Question Actually Presented Below Was Properly Decided on the Basis of Settled Law*

The Fowlkes advance two alternative theories for attacking the condemnation in question. In their original pleadings, they attacked the constitutionality of the Texas statutes[5] under which the condemnation proceedings were allegedly conducted, on the ground that such statutes "by their terms sanction such taking for purposes other than public purposes." (App. 20.) This was a direct attack on

[5] See note 2 *supra*, and accompanying text.

the constitutionality of the Texas statutes. The district court and the Fifth Circuit properly noted that those statutes had previously been attacked and that it already had been determined that these statutes "pass constitutional muster." Petitioners' Appendix at 5a.

The Texas statutes in question "pass constitutional muster" against arguments such as those originally made by the Fowlkes, because they have been authoritatively construed by the courts of Texas *not* to permit condemnation of property for private purposes. *See Porter* v. *Southwest Public Service Company,* 489 S.W.2d 361, 363 (Tex. Civ. App. — Amarillo 1972, writ ref'd n.r.e.); *Arcola Sugar Mills Co.* v. *Houston Lighting & Power Co.,* 153 S.W.2d 628, 633 (Tex. Civ. App — Galveston 1941, writ ref'd w.o.m.). If the challenged statutes did, contrary to fact, attempt to authorize condemnation of private land for merely private purposes, the state courts of Texas have authoritatively stated that such statutes would be invalid under Article I, Section 17 of the *Texas* Constitution. *Dallas Cotton Mills* v. *Industrial Co.,* 290 S.W. 503 (Tex. Comm. App. 1927, jdgmt adopted). The Fowlkes themselves now concede that it is settled under Texas law that the power of eminent domain cannot be exercised for private purposes. *See* Petition for Certiorari at 8, 9. [6]

Accordingly, in their petition to this Court the Fowlkes have shifted their attack from the constitutionality of the statutes themselves to the use made of these statutes by Intratex and Oasis. Specifically, they now claim that Intratex and Oasis used these statutes to condemn their land for private purposes.

[6] Intratex and Oasis believe (as the Fowlkes apparently now concede; see Petition for Certiorari at 8, 9) that the Texas law to be applied to the Fowlkes' current claim clearly bars takings for private purposes and thus does "pass constitutional muster." If, however, there were any doubt about this question, Intratex and Oasis submit that abstention in this case *would* be required, in order to permit such doubt to be removed in the pending state court proceedings, even assuming that the federal court had diversity jurisdiction or some other jurisdiction over the cause. *See, e.g., Reetz* v. *Bozanich,* 397 U.S. 82 (1970); *Louisiana Power and Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959).

Aside from the fact that this claim was not presented to the district court, it affords no reason for disturbing that court's summary judgment order, as affirmed by the Fifth Circuit. The Fowlkes' new claim that Intratex and Oasis have improperly utilized Texas statutes for an unconsitutional purpose does not raise a question over which a federal court has jurisdiction under either 28 U.S.C. § 1331 (1970) or 28 U.S.C. § 1343 (1970). These are the only bases of jurisdiction which the Fowlkes chose to plead and the only bases, so far as it appears, which they could have chosen.

Federal courts lack jurisdiction over the Fowlkes' new claim under section 1331 or section 1343 because, since it is Texas law that prohibits the conduct with which they now charge Intratex and Oasis, it is Texas law which they must invoke and, in fact, have invoked on their behalf. A federal court can decide such questions of state law only, as the district court noted, when it has diversity of citizenship jurisdiction. A clear example of such a case is *County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185 (1959), in which the district court, having *diversity* jurisdiction, properly investigated the very question under Pennsylvania law that the Fowlkes now seek to raise with respect to Texas law. Since the present case, unlike *Mashuda,* is *not* a diversity case, the Fowlkes must pursue their claim that Texas law has been violated in the Texas courts — as they are doing.

CONCLUSION

For the foregoing reasons, Respondents Intratex Gas Company and Oasis Pipe Line Company respectfully urge that the Petition for a Writ of Certiorari filed in this cause by W. W. and Laura Jane Fowlkes be in all things denied and that Respondents be awarded their costs incurred in connection with the filing of this response to that Petition.

Respectfully submitted,

J. EVANS ATTWELL
JOHN L. CARTER
P. M. SCHENKKAN
2100 First City National
Bank Building
Houston, Texas 77002
713-651-2222

Of Counsel:

RICHARD C. ALSUP
JAMES H. CHANDLER
1600 Houston Natural Gas
Building
Houston, Texas 77002
713-654-6777

VINSON, ELKINS, SEARLS,
CONNALLY & SMITH
2100 First City National
Bank Building
Houston, Texas 77002
713-651-2222

CERTIFICATE OF SERVICE

This is to certify that three copies of this reply to the petition for certiorari were mailed by United States mail to the attorneys of record for the petitioners, Mr. James Lukin Drought and Mr. Robert Lee Bobbitt, Jr., 1600 Frost Bank Tower, San Antonio, Texas 78205, on this the day of December, 1976.